

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

19 CR 626 (PAE)

AGUSTIN MARMOLEJOS,

Defendant.

Sentence
(via CourtCall)

New York, N.Y.
November 24, 2020
11:00 a.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

AUDREY STRAUSS

Acting United States Attorney for the
Southern District of New York

BY: BENJAMIN SCHRIER

Assistant United States Attorney

TELESFORO DEL VALLE, JR.

Attorney for Defendant

Also Present:

Sonia Berah, Interpreter (Spanish)

1 (Case called)

2 THE COURT: I'm calling the case of United States v.
3 Marmolejos, 19 CR 626. Who do I have for the government?

4 MR. SCHRIER: Good morning, your Honor, Ben Schrier
5 for the government.

6 THE COURT: Good morning, Mr. Schrier. Who do I have
7 for the defendant?

8 MR. DEL VALLE: Good morning, your Honor, Ted Del
9 Valle representing Mr. Agustin Marmolejos.

10 THE COURT: Good morning, Mr. Del Valle.

11 Mr. Marmolejos, are you present?

12 THE DEFENDANT: Yes.

13 THE COURT: I will note for the record that I can see
14 Mr. Marmolejos as well as both counsel who have spoken.

15 Are our interpreters, Ms. Berah and Ms. Hess, both on
16 the call?

17 THE INTERPRETER: Only Sonia Berah is on the call. We
18 were not able to merge the other line, your Honor.

19 THE COURT: Thank you, Ms. Berah.

20 Ms. Berah, you are a court certified pre-sworn
21 interpreter, correct?

22 THE INTERPRETER: Yes, sir, I am.

23 THE COURT: Very good. Let's get started.

24 Before we get to the content of the sentencing
25 proceeding, I need to go through a few preliminaries because of

1 the remote nature of the proceeding. Here goes.

2 We are in the midst of the COVID-19 pandemic. I'm
3 conducting this proceeding pursuant to the authority provided
4 by Section 15002 of the CARES Act and the standing orders
5 issued by our chief judge pursuant to that act. Counsel are
6 appearing before me by video conference, so is the defendant.
7 Indeed, we are all here by video conference. I confirmed a
8 moment ago that everyone can hear me.

9 Please, everyone, let me know immediately if you are
10 having any difficulty hearing me or hearing the speaker and for
11 the defendant and Mr. Del Valle and Mr. Schrier, if you can't
12 see me or see the others, please do your best to make that
13 known as well.

14 I will be calling on each of you during these
15 proceedings. When I do, please identify yourself by name for
16 clarity of the record. Please don't interrupt each other or me
17 during the conference. Otherwise, it's impossible for the
18 court reporter to make a record.

19 Mr. Del Valle, I have been advised that your client
20 can't participate in person in the usual way today, that is by
21 being physically present in the courtroom on account of various
22 public health considerations relating to the COVID pandemic.

23 Mr. Del Valle, is that so?

24 MR. DEL VALLE: Yes. And I conferred with my client
25 about this, and he has indicated to me that he consents to the

1 proceedings going on in this fashion.

2 THE COURT: Very good. I will get to that.

3 Right now I just want to make sure that there is
4 reason for his inability to have this scheduled in person. And
5 I gather it is because of a desire on your part and his not to
6 undertake what additional public health risks might be
7 presented by an in-person proceeding, or for your client what
8 additional quarantines might be generated by an in-person
9 proceeding. Is that correct?

10 MR. DEL VALLE: That is correct, your Honor.

11 THE COURT: I find then that conducting this
12 proceeding in person in court is not reasonably available. I
13 do, however, find that videoconferencing is reasonably
14 available and that Mr. Marmolejos is able to participate by
15 those means.

16 As to the point you raised a moment ago about your
17 client's waiver of an in-person proceeding, Mr. Del Valle, I
18 think you have not provided us with a written waiver signed by
19 your client to that effect, is that correct?

20 MR. DEL VALLE: That is correct, your Honor. I have
21 no access to have my client physically sign it.

22 THE COURT: Understood. I therefore find that, based
23 on what you've said, obtaining a written waiver wasn't
24 realistically available. Have you nonetheless, Mr. Del Valle,
25 spoken with your client about the right to have this proceeding

1 occur with everyone in court if he so chose?

2 MR. DEL VALLE: I have, your Honor.

3 THE COURT: Did you explain to your client that he had
4 a right to be present in court with all of us present in court
5 for sentencing?

6 MR. DEL VALLE: I did, your Honor.

7 THE COURT: Did you believe, based on that
8 conversation, that your client understood that right?

9 MR. DEL VALLE: I do, your Honor.

10 THE COURT: Was he willing to give up that right?

11 MR. DEL VALLE: Yes, your Honor.

12 THE COURT: And did an interpreter assist you or were
13 you able to speak with him in Spanish in having that
14 communication?

15 MR. DEL VALLE: I was able to speak to him in Spanish
16 having that communication, your Honor.

17 THE COURT: Mr. Marmolejos, I am going to turn to you
18 now. Do you understand that you have a right to have this
19 sentencing proceed in person, meaning that you and your lawyer
20 and the government's lawyer and me and everyone else would be
21 assembling in person in a courtroom?

22 THE DEFENDANT: Yes.

23 THE COURT: And do you understand that you are not
24 required to proceed today by video conference, and if you'd
25 like to exercise your right to have this sentencing proceed in

1 person, we can reschedule it as promptly as we can so that it
2 proceeds in person.

3 Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: If you agree to proceed by video
6 conference, you and Mr. Del Valle obviously can still equally
7 participate in the proceeding. And if you want at some point
8 or he wants at some point to have a private conversation, just
9 the two of you, Mr. Smallman can arrange for you to confer in
10 private in a private video room for just the two of you.

11 Do you understand that?

12 THE DEFENDANT: Yes, yes.

13 THE COURT: Do you wish to give up your right to be
14 sentenced in person with your lawyer by your side?

15 THE DEFENDANT: Yes.

16 THE COURT: I need you to answer questions yes or no,
17 and then the interpreter will communicate your verbal yes or no
18 to me. Thank you.

19 I find a knowing and voluntary waiver of
20 Mr. Marmolejos' right to be present in person for this
21 sentencing.

22 Finally, I need to make a finding as to why this
23 proceeding can't be delayed without harm to the interests of
24 justice.

25 Mr. Del Valle, I'm mindful we were supposed to have

1 this proceeding originally in the month before the pandemic
2 struck. Very briefly, why is it that the sentencing proceeding
3 can't be any further delayed?

4 MR. DEL VALLE: Your Honor, very briefly, this is a
5 sentencing that has been delayed exactly twice because I was
6 not the original lawyer on this case. And when I came in, I
7 was actually brought in for the sentencing aspect of this case
8 with Mr. Marmolejos. I did do my due diligence and go over the
9 plea and everything else in the agreement. And at this point
10 Mr. Marmolejos has been in the institution for a year, almost a
11 year, and in the interests of justice, we are requesting that
12 this matter go forward today on sentencing.

13 THE COURT: I take it, among other things, the benefit
14 of having a sentencing now is that Mr. Marmolejos, to the
15 extent that he would otherwise be sentenced to a permanent
16 longer-term facility, would get out of the MDC and go to a
17 facility with more space, more programming and potentially
18 reduce COVID risk.

19 MR. DEL VALLE: That is correct, your Honor.

20 THE COURT: On those grounds, I also find that the
21 sentencing proceeding cannot be further delayed without harm to
22 the interests of justice.

23 There is one final preliminary matter I need to take
24 up. As counsel are aware, the Due Process Protections Act was
25 recently passed which requires a Court to advise the government

of its *Brady* obligations in a written and an oral order. I put a written order on the docket of the case.

Orally, briefly, Mr. Schrier, I am reminding the government, pursuant to Federal Rule of Criminal Procedure 5(f), of its obligations under *Brady v. Maryland* and its progeny to disclose to the defense all information, whether admissible or not, that is favorable to the defendant, material to either guilt or punishment and known to the government. I remind you that these obligations are continuing ones. They apply to information whether or not you credit it.

I have issued, as I said, a written order to this effect, and I incorporate by reference everything there. I incorporate by reference as well the list of all the consequences that may follow from the government's common compliance with those obligations.

Government, do you understand these obligations and confirm that you will fulfill them and have fulfilled them?

MR. SCHRIER: Yes, your Honor, as to all three questions.

THE COURT: Very good. One moment.

Now we can finally turn to the business of the sentencing. We are here today to impose sentence in the case of United States v. Agustin Marmolejos.

On February 19, 2019, Mr. Marmolejos pled guilty pursuant to a plea agreement to one count of narcotics

1 conspiracy involving the distribution and possession with
2 intent to distribute 400 grams and more of fentanyl and one
3 kilogram and more of heroin.

4 In preparation for today's proceeding I have reviewed
5 the plea agreement, the transcript of the plea proceedings. I
6 have also reviewed the presentence report, dated June 2, 2019.
7 I have also reviewed the following additional submissions: The
8 defendant's submission, dated July 6, 2020, the government's --
9 forgive me. The presentence report was June 2, 2020; the
10 defendant's sentencing submission, dated July 6, 2020; the
11 government's submission, dated June 1, 2020; and numerous
12 letters in support of Mr. Marmolejos from his friends and
13 family filed October 20, 2020.

14 Have the parties received each of these submissions
15 and are there any additional ones?

16 Mr. Schrier.

17 MR. SCHRIER: I have also reviewed all those
18 materials, your Honor, and there are no other materials in
19 which I am aware.

20 THE COURT: Mr. Del Valle, same question.

21 MR. DEL VALLE: I have received all the submissions,
22 your Honor, I have reviewed them, and there no additional ones.

23 THE COURT: Mr. Del Valle, have you read the
24 presentence report?

25 MR. DEL VALLE: I have read the presentence report,

your Honor.

THE COURT: Have you discussed it with your client?

MR. DEL VALLE: I have discussed it with my client.

THE COURT: Mr. Marmolejos, have you read the presentence report and has it been translated to you?

THE DEFENDANT: Yes.

THE COURT: Have you discussed it with Mr. Del Valle?

THE DEFENDANT: Yes.

THE COURT: Have you had the opportunity to go over with Mr. Del Valle any errors in the report or anything else that should be taken up with the Court?

THE DEFENDANT: Yes.

THE COURT: Mr. Schrier, have you reviewed the presentence report?

MR. SCHRIER: Yes, your Honor.

THE COURT: Putting aside the calculation of the sentencing guidelines for just a minute, does any counsel have any objection to the report regarding its factual accuracy?

Mr. Schrier.

MR. SCHRIER: None from the government, your Honor.

THE COURT: Mr. Del Valle.

MR. DEL VALLE: None from the defendant, your Honor.

THE COURT: Hearing no objections, the Court will adopt the factual recitation set forth in the presentence report. The report will be made a part of the record in this

1 matter and placed under seal. In the event an appeal is taken,
2 counsel on appeal may have access to the sealed report without
3 further application to the Court.

4 Counsel, I believe you have already publicly filed
5 your sentencing submissions. If you have not, please do so.

6 Turning to the sentencing guidelines, the Court, of
7 course, is no longer required to follow the guidelines, but I
8 am required to consider the applicable guidelines in imposing
9 sentence. To do so, it's necessary that I accurately calculate
10 the guidelines sentencing range.

11 Now, in this case there was a plea agreement in which
12 the parties stipulated to a particular calculation of the
13 sentencing guidelines on the premise that the safety valve
14 provision of 18 U.S.C. Section 3553(f) applies.

15 Am I correct that the calculation in the presentence
16 report is in accord with that agreement?

17 Mr. Schrier.

18 MR. SCHRIER: Yes, your Honor.

19 THE COURT: Mr. Del Valle.

20 MR. DEL VALLE: Yes, your Honor.

21 THE COURT: Mr. Schrier, can you briefly make a
22 proffer to the Court, very briefly, as to why the safety valve
23 applies.

24 MR. SCHRIER: Yes, your Honor.

25 Prior to pleading, Mr. Marmolejos, with his counsel,

1 met with the government and proffered as to his involvement in
2 the offense.

3 Based on the information available to the government,
4 the government believes that Mr. Marmolejos was truthful and
5 forthcoming as to the offense conduct. The government is not
6 aware of any other factors or aspects of the defendant's
7 criminal history that would disqualify him for a safety valve
8 relief. So on that basis, in the government's view,
9 Mr. Marmolejos is eligible.

10 THE COURT: I agree with that, and I also so find.

11 Given that, based on the parties' agreement and the
12 absence of objection and my independent evaluation of how the
13 sentencing guidelines apply here, I accept the guideline
14 calculation in the presentence report which, in turn, is based
15 on the assumption that the safety valve applies. I find that
16 the offense level is 27, the criminal history category is I,
17 and the guideline range is 70 to 87 months.

18 The next subject I need to cover is departures, which
19 is to say within the sentencing guidelines framework. In the
20 plea agreement, both parties agreed that neither an upward nor
21 a downward departure within the guidelines framework is
22 merited. Having reviewed the presentence report and the
23 parties' submissions, I share that conclusion. I find that no
24 departure is available as a matter of law. Of course that
25 doesn't preclude any party from seeking a variance, and I

1 understand that the defense is seeking a downward variance
2 here.

3 Having taken care of those necessary preliminaries,
4 does the government wish to be heard with respect to
5 sentencing?

6 MR. SCHRIER: Yes, your Honor, briefly.

7 For the most part, the government will rely on its
8 written submissions, but I did want to highlight two facts in
9 particular that I think are germane to sentencing.

10 The first is a point that the government does make in
11 its written submission, which is that the type and quantity of
12 drugs here are very concerning. In this instance,
13 Mr. Marmolejos has pleaded guilty to an offense involving a
14 kilogram of fentanyl and 3.1 kilograms of heroin.

15 As the government explained in its sentencing
16 submission, particularly the fentanyl is concerning. This is
17 an inherently dangerous drug that poses a disproportionate
18 overdose risk. As for the fentanyl and the heroin in
19 conjunction, they contribute to the opioid crisis that the
20 United States and New York City specifically are suffering
21 through. So all drugs are dangerous, all drugs are serious.
22 These are particularly dangerous and particularly serious
23 drugs. And the quantities here are well in excess of the
24 amount necessary to trigger the ten-year mandatory minimum,
25 which would be applicable if not for the defendant's safety

1 valve eligibility.

2 Another point that I wanted to note, which jumped out
3 at me last night as I was reviewing the materials in advance of
4 sentencing, is that there are a number of cases in this
5 district, I have been involved in some, in which the defendant
6 is essentially acting as a courier and is no more involved than
7 that. I think that we would all agree that that sort of
8 minimal role is a significant mitigating factor in a narcotics
9 case.

10 In this instance, there are several facts which taken
11 together suggest that Mr. Marmolejos was involved in more than
12 mere quotidian narcotics distribution. On at least two
13 occasions, when he is distributing narcotics to the CS, there
14 is actually another person involved, so Mr. Marmolejos arranges
15 the deal and is there. Shortly after he stops speaking with
16 the CS, another person comes and delivers the drugs.

17 Another fact that jumped out to me is from paragraph
18 15 of the presentence report which reflects that Mr. Marmolejos
19 told the CS that he needed the money for the drugs that he was
20 selling, specifically the three kilograms of heroin, because he
21 owed \$79,000 to a drug trafficking organization in Los Angeles.

22 So the government is certainly not taking the position
23 that a guidelines enhancement is appropriate because
24 Mr. Marmolejos was a leader or organizer, or something like
25 that, but I do think that in context Mr. Marmolejos' role here

1 appears to have been more than just a mere courier, and that's
2 reflected both by the facts that I just described as well as
3 the quantity of drugs.

4 For those reasons, the government believes that a
5 guidelines sentence would be appropriate here.

6 THE COURT: Thank you. Very helpful.

7 Mr. Del Valle, do you wish to be heard?

8 MR. DEL VALLE: Yes. If your Honor pleases.

9 Your Honor, I first would like to address the crime
10 itself. It is a very serious crime. Mr. Marmolejos is aware
11 of that now more than ever.

12 The thing I see often, and I dare say the Court sees
13 often, is that many drug defendants come before the Court and
14 say I didn't know what it was or I didn't know fentanyl, as it
15 is here, is that serious. Then they realize. The guidelines
16 reflect the seriousness of fentanyl accusations as opposed to
17 cocaine, for example.

18 The truth of the matter is that, no, Mr. Marmolejos
19 isn't a courier, we wouldn't say he was a courier, and that's
20 why he wasn't given any further consideration for being a
21 courier as a minor or minimal participant.

22 But Mr. Marmolejos was a broker. As often is the
23 case, it is the person in between that puts people together.
24 When a person on the street, your Honor, says, I owe \$79,000 to
25 Mexicans, it's because when drugs are missing, or people don't

1 pay on the drugs, or something goes wrong in some broker deal,
2 they are held responsible. Someone is responsible to the
3 cartel. We all know the viciousness of the cartel, especially
4 in Mexico, and the fear that that instills on people who are
5 arguably low-level street dealers. I don't want to belabor the
6 point because I know there was a proffer here. Obviously, the
7 government is satisfied from the proffer that Mr. Marmolejos
8 was honest, completely honest, about his role in this matter.

9 I do want to point out some personal things about
10 Mr. Marmolejos. He is 34 years old, your Honor. By virtue of
11 the fact that he's a permanent resident of the United States,
12 he stands to be deported immediately once completing his
13 sentence in this matter.

14 He has never been arrested in his entire life. He has
15 a high school education, albeit from the Dominican Republic,
16 but he comes from a very, very humble family there. His father
17 is still a farmer. His mother sells what they harvest from
18 that farm in a small hut off the road in the Dominican
19 Republic.

20 They live, they continue to live under very poor
21 economic conditions. I was very surprised that until this day
22 his mother and father lived in a home where there is no indoor
23 plumbing at all. Water, they have to go outside. Their
24 necessities, they have to go outside. They did get some
25 electricity back when Mr. Marmolejos was eight years old, and

1 that's just been the essential same condition of this home.

2 At the age of seven, your Honor, Mr. Marmolejos would
3 have to wake up and 5 in the morning and milk cows before going
4 to school. When he came home, he would complete the chores.
5 He never complained about that, but it was just part of his
6 life, of his upbringing.

7 He was fortunate enough, your Honor, to come into this
8 country, become a legal permanent resident. And when he came
9 here, he had various jobs. He was a dishwasher at Dave &
10 Buster's. He was a manager of a supermarket in Newark. He
11 worked at a sushi restaurant in Paterson, New Jersey.

12 In the midst of all of this, he got married to
13 Ms. Angie Rodriguez back in 2005. They divorced in 2018. But
14 as a product of that marriage they have a four-year-old
15 daughter, which Mr. Marmolejos is very, very close to. This
16 daughter is a special child. She suffers from autism and
17 really has touched everybody's heart in Mr. Marmolejos' family.
18 He also the father of a nine-year-old boy and another
19 ten-year-old daughter. He is also the father of a 15-year-old
20 daughter.

21 The 15-year-old daughter, unfortunately, has taken
22 everything that has happened a little bit hard. Mr. Marmolejos
23 blames himself for this, as personally I think he should. But
24 she, unfortunately, has even attempted to commit suicide. She
25 is under psychiatric treatment. When asked, all she says and

1 repeats is she wants her daddy back. She is 15 and that's the
2 way she speaks.

3 I have spoken to the family at length about this. I
4 also tried to keep the family from submitting certain papers
5 directly to the Court because of HIPAA concerns. But there are
6 letters that have been sent with respect to that. And I know
7 your Honor has read each and every letter carefully.

8 If the Court will permit me, I just want to highlight
9 some of the letters. I know there are multiple. I am not
10 going through all of them.

11 But there is a letter from his 15-year-old daughter to
12 the Court, for purposes referred as CMR, which she indicates to
13 the Court that her depression and how she has tried to -- as
14 she put it: I have hurt myself.

15 There is also a letter from the other daughter that
16 says: My older brothers always looked up to my father and
17 looked up to him as a dad since his dad was not around. So
18 this Mr. Marmolejos' stepson. And she says that the defendant
19 was always really respectful when it comes to me. He never
20 disrespected me or anyone in my family. He is awesome with my
21 little brother, the most caring man I have ever met, the best
22 dad a kid could ask for. He always tries to motivate me to go
23 to school and to improve myself into being someone.

24 There is a letter from Inwood Academy that speaks to
25 the toll this has taken on the 15-year-old daughter, which I'm

1 sure your Honor has reviewed, and the fact that she is going to
2 various counseling sessions.

3 There is a letter from the Jewish Board indicating the
4 diagnosis of the 15-year-old daughter and the intake
5 evaluations and psychiatric evaluations.

6 There are letters from the community, also.

7 One thing your Honor you will see, as a common
8 denominator in all these letters, aside from the fact that they
9 all speak about Mr. Marmolejos being a very good father and a
10 good son and a good nephew or grandson, it talks also about the
11 fact that he was a very giving person in his community,
12 especially in the Dominican Republic.

13 There is a letter here from his wife. It says: I
14 know Agustin Marmolejos since we were teenagers. He would
15 always go to work with his father to help him and then went to
16 school. He's a good father and he cares about his kids. She
17 goes on to say when she was sick: I had surgery, he took care
18 of me. And he is always telling me to finish college and don't
19 worry about everything. And he is also always worried about
20 the younger daughter that has autism.

21 His mother-in-law sent a letter. That's Ms. Carmen
22 Lidia Gonzalez. She says: I have known Agustin since he was
23 17 years old. He is an amazing father and a good person.

24 Mr. Marmolejos' mother sent a letter about him, not
25 too different from letters that any mother would send about

1 their son.

2 Interestingly, she puts down that: He always
3 organizes people from the environment to make collections and
4 among all of them, giving gifts of food and toys to the less
5 fortunate. This situation has affected us all, but more to me
6 emotionally, mentally, and physically.

7 His aunt, Alicia Santos, goes on to say: On
8 Christmas, he is the one that cares for our children and the
9 elderly in our community and helps them with gifts and toys for
10 the children.

11 His uncle, Mr. Paulina Marmolejos, says: On
12 Christmas, he always sets the ambience, and he visits the
13 elderly and the children and gives them re-collected toys. He
14 is a beautiful nephew with whom I used to go to church with,
15 and I would like to see him here once more so we could go back
16 together.

17 A neighbor in the Dominican Republic, her name is
18 Jesusita Santos Mercedes, writes: He has always been helping a
19 whole community here, the elderly and the children. Agustin is
20 a good son, a good father, a good husband, a good grandson, a
21 good nephew.

22 There is a pastor, he's a pastor of a church down in
23 the Dominican Republic and a friend of the family. And he
24 says, aside from the fact that he knows the family and how good
25 of a person Agustin is that: I can tell you about a time when

1 the church needed a vehicle to transport the brothers and
2 sisters. Agustin found out about that and immediately gathered
3 a group of people to collect money and donations, and thank God
4 for the initiative he took because today the church has a
5 vehicle for the service of all.

6 His father, Mr. Antolin Marmolejos, says: He always
7 helps those most in need, especially at Christmastime, by
8 making collections to provide food to various families and to
9 children with very few resources. He gives toys. He gives
10 collections.

11 His aunt, Basilia Santos, says: He is not only my
12 nephew, but he is like my son. He is very loving, happy, and
13 cooperative in all projects of the community.

14 There are various letters. There is a letter from a
15 high school teacher.

16 THE COURT: Mr. Del Valle, just so you know, I have
17 read all the letters. I appreciate what you're doing. You can
18 rest assured that I have read them in detail.

19 MR. DEL VALLE: I thank your Honor for that, and I
20 know Mr. Marmolejos thanks you as well.

21 I just wanted the Court to see the common denominator,
22 not just the fact that he is considered a good father and a
23 good son or family member. But the fact that -- I hate to say
24 the phrase because -- I'll dare say, sort of like a Robin Hood
25 type of situation here where he has gone back to this very,

1 very poor community and has given them, contributed to them,
2 and not only financially, but I guess emotionally as well when
3 he would go each and every Christmas to them.

4 Your Honor, clearly this is a very serious crime and
5 clearly Mr. Marmolejos acknowledges that.

6 I do want to talk about one other thing which I know
7 has been really resonant during this period of time and that's
8 Mr. Marmolejos' incarceration at the Metropolitan Detention
9 Center. These are very drastic measures that they are taking
10 at Metropolitan Detention Center.

11 Without blaming anyone, at first they didn't know how
12 to handle this and these prisoners -- Mr. Marmolejos isn't
13 excluded from that -- were subject to 23, 24-hour lockdowns.
14 They were not able to communicate with their family at all.
15 They are still subject not to have any type of visitors at all.
16 They haven't seen their faces, the faces of any of their loved
17 ones, because unlike the forum where we are operating today,
18 they are not even allowed to do that.

19 When you have people locked in a situation like that
20 and they let them out unit by unit and they give them a certain
21 period of time, which is really an hour and 40 minutes, to make
22 phone calls, take a shower, and get your food, and then have to
23 really battle it out to get a phone call into your family.
24 Very rarely do you get to speak to your family, maybe once a
25 week. The situation gets worse when something happens in the

1 institution. Obviously, they just lock everybody down.

2 Mr. Marmolejos has gone as much as four or five days without
3 even being able to take a shower because someone else in the
4 unit was disciplined.

5 These are not the normal situations which I'd like to
6 say that the United States has in federal detention centers. I
7 understand, I realize that we are in the middle of a pandemic.
8 But these are human beings that are locked under a situation in
9 a prison that's equivalent to third-world prisons.

10 And that is something where a person like Mr. Agustin
11 Marmolejos, had he committed this crime as little as two years
12 ago, he would not have suffered all of this. And I ask that
13 the Court also take this into account because this is -- this
14 is really doing hard time there where he has been.

15 With all of that, your Honor, I respectfully request
16 that your Honor sentence Mr. Marmolejos on a variance from the
17 recommended sentence of the guidelines. Thank you.

18 THE COURT: Thank you, Mr. Del Valle. Thank you for a
19 very effective sentencing submission. Thank you for collecting
20 all of those very powerful letters. As you know from prior
21 sentencings before me, I fully agree with your view that time
22 served during the COVID pandemic equates to harder time than
23 was ever intended and that needs to be reflected in the
24 sentence, I believe.

25 With that, Mr. Marmolejos, do you wish to make a

1 statement?

2 THE DEFENDANT: Yes.

3 THE COURT: By all means, go ahead.

4 THE DEFENDANT: Your Honor and to everybody present,
5 thank you for hearing me out in this court.

6 Your Honor, I recognize that I have committed this
7 crime, and I apologize to everybody whom I've hurt directly and
8 indirectly and to the Court. I also apologize to my family,
9 and I apologize for any pain I may have caused them with my
10 actions.

11 This time that I've been deprived of my freedom has
12 been the most painful time of my life. The conditions in
13 prison have been very severe due to the restrictions brought
14 about by the pandemic. As my lawyer already stated, there is
15 no communication. We have to keep distance. The hygienic
16 conditions are not good.

17 And taking into account everything that I've
18 mentioned, please take into account how repentant I am. I pray
19 to God and to your Honor to have mercy on me because both my
20 well-being and my freedom are in your hands. I'm aware that
21 there is nothing that justifies my bad actions. I'm very
22 remorseful and I'm very sorry and I am very repentant. And I
23 ask you to give me an opportunity. Independently of what your
24 decision may be today, I promise you that I will not commit
25 another crime. Thank you.

1 THE COURT: Thank you, Mr. Marmolejos.

2 I am going to take a moment and review my notes and
3 collect my thoughts.

4 (Pause)

5 THE COURT: Is there any reason why sentence should
6 not now be imposed?

7 Government.

8 MR. SCHRIER: No, your Honor.

9 THE COURT: Defense.

10 MR. DEL VALLE: No, your Honor.

11 THE COURT: As I have stated, and as everyone agrees,
12 the guideline range that applies to this case, because the
13 safety valve applies, is between 70 and 87 months'
14 imprisonment.

15 Under the Supreme Court's decision in *Booker* and the
16 cases that have followed it, the guideline range is only one
17 factor that a Court must consider in deciding the appropriate
18 sentence. The Court must also consider the other factors set
19 forth in the sentencing statute: Title 18, United States Code,
20 Section 3553(a).

21 These factors include: The nature and circumstances
22 of the offense and the history and characteristics of the
23 defendant, the need for the sentence imposed to reflect the
24 seriousness of the offense, to promote respect for the law and
25 to provide just punishment for the offense, the need for the

1 sentence imposed to afford adequate deterrence to criminal
2 conduct, the need for the sentence imposed to protect the
3 public from further crimes of the defendant, and the need for
4 the sentence imposed to provide the defendant with needed
5 educational or vocational training, medical care, or other
6 correctional treatment in the most effective manner.

7 The Court is also required to impose a sentence
8 sufficient but no greater than necessary to comply with the
9 purposes that I have just summarized, and here I find that the
10 sentence I'm about to pronounce is sufficient, but no greater
11 than necessary, to satisfy the purposes of sentencing that I
12 have just reviewed.

13 Mr. Marmolejos, I have given a lot of thought and
14 attention to the appropriate sentence in your case in light of
15 those Section 3553(a) factors and the appropriate purposes of
16 sentencing, as reflected in the statute.

17 The following are my thoughts: Under Section 3553(a),
18 among other factors, I am to consider the seriousness of your
19 offense, the need for the sentence I impose to reflect just
20 punishment, the need for the sentence I impose to promote
21 respect for the law. In other words, the sentence has to fit
22 the crime. That factor weighs heavily here.

23 Over about a six-week period in the middle of 2019,
24 when you were collaborating with the government's confidential
25 source, you brokered a series of multikilogram quantity sales

1 of heroin and fentanyl. The quantity of drugs that you
2 distributed was such that it supported a mandatory minimum
3 ten-year sentence under the narcotics laws, which the Court
4 would have been required to impose had you not qualified for
5 the safety valve. There is every indication that you would
6 have kept on selling.

7 The government ultimately engineered a traffic stop
8 that appears to have aroused your suspicion that led you to cut
9 off contact with the CS. Afterwards, the government lost track
10 of you until it intercepted you in December, attempting to
11 leave the country for the Dominican Republic. Logically, there
12 is no reason to assume that your kilogram-level drug dealing
13 began with the confidential source, and there is no reason to
14 assume that your instinct to sell drugs as a means of making
15 money would have durably stopped after the confidential
16 source's cover was blown. It is reasonable to infer is that
17 your intention was to engage in drug dealing over a longer
18 haul.

19 Your drug dealing is serious for obvious reasons. As
20 a general matter, illegal narcotics produce drug addiction,
21 they correlate with violence, they destroy lives, they destroy
22 communities, they destroy families. And while that is true in
23 general, it's particularly true of the drugs that you sold.

24 As a country, as Mr. Schrier said, we have been in the
25 midst of an opioid epidemic. The number of deaths and lives

1 otherwise destroyed as a result of heroin is epidemic.
2 Fentanyl is even more toxic. With absolutely no sign of any
3 hesitation or regret, you willingly pedaled very large
4 quantities of those drugs to the CS.

5 Because the CS was working for the government, the
6 drugs that you sold him or conspired to sell didn't find their
7 way into the hands of buyers, but your expectation was that
8 they would. To make money from illegal drugs, you were willing
9 to risk the lives and futures of the downstream drug buyers.
10 That is incredibly harmful and wrongful behavior. More than
11 any other section 3553(a) factor, the gravity of your long
12 doing demands a substantial sentence.

13 Under section 3553(a), I also have to consider the
14 interest in general deterrence. That refers to the need for
15 the sentence I impose to send a message to other people that is
16 sufficient to deter them from engaging in similar crimes. That
17 factor is present here, too.

18 Drug dealing in general and heroin and fentanyl in
19 particular are huge problems in our country and in this
20 district. I see far too many cases on my docket. So do my
21 colleagues. It is important that the sentences imposed in such
22 cases, taken as a whole, be sufficient to convey a message to
23 people who would follow your lead and sell these toxic drugs.
24 The message is don't do that because if you do so and you get
25 caught, you will be facing a long time behind bars.

1 Under Section 3553(a), I also have to consider the
2 interest in what's called specific deterrence. That refers to
3 the need for the sentence I impose to send a message to the
4 specific defendant before me -- and here that's you,
5 Mr. Marmolejos -- that is sufficient to deter him from
6 committing future crimes.

7 That factor is important here, but it weighs less than
8 it does in cases involving defendants who have prior criminal
9 records. Where a defendant has been arrested and prosecuted
10 and sentenced before and then turns around and commits a new
11 serious crime like drug dealing, I generally conclude that a
12 longer sentence is needed in order to get their attention.
13 Their earlier sentences, by definition, had not been successful
14 as wakeup calls, so something more is needed.

15 Your situation is different. Since this was your
16 first arrest and your time in prison in this case appears to be
17 your first time in prison, it is possible that the very hard
18 experience that you're now having, which you've had in federal
19 prison since late last December, will be the wakeup call that
20 you need and that a very long sentence is less necessary in
21 your case to get your attention enough to deter you from ever
22 committing such a crime again. I hope so.

23 I do note, though, as to specific deterrence one
24 factor that points in the other direction. You committed this
25 crime at age 33. You did so as a fully grown adult and with

1 family responsibilities as a father of, by my count, four
2 children. Many defendants whom I have sentenced for drug
3 crimes were in their late teens or early twenties. In those
4 cases, their lawyers have often argued to me that the defendant
5 was young and immature and growing up. That argument is not
6 really available to you due to the stage of life in which you
7 turned to drug dealing. Bottom line, you can't claim to have
8 been young and still maturing at the time you committed the
9 crime. I conclude that a meaningful sentence is needed here as
10 a matter of specific deterrence, although not nearly as long as
11 would have been necessary had you been a repeat offender.

12 Finally, under section 3553(a), I have to consider the
13 interests of public protection or incapacitation. And that
14 refers to the benefit that the free public gets from your being
15 in federal prison where, by definition, you can't commit crimes
16 that endanger them.

17 That factor is also present here. To the extent that
18 you might have any impulse to sell drugs, it follows that the
19 public is protected from your doing so from a sentence that
20 keeps you in prison. Again, since this is your first offense,
21 it's less clear than in other cases that you are likely to
22 return to crime, and I sure hope you won't. But because I
23 can't rule out that possibility, there is some public interest
24 here in your incapacitation.

25 So far, I have considered factors that, by their

1 nature, tend to favor a substantial sentence and a number of
2 them do in your case. But there are factors that favor you in
3 the sentencing equation. I want to review them with you now.

4 First off, you accepted responsibility. You did so by
5 pleading guilty and admitting your crime and having the safety
6 valve proffer with the government. Your plea of guilty makes a
7 difference to me, as it does under the sentencing guidelines.
8 Were it not for the guilty plea, please note that the sentence
9 I impose today would have been materially higher and, as I say,
10 you deserve credit for participating in the safety valve
11 proffer. Your remarks today were also consistent with true
12 repentance, as you said.

13 Second, under Section 3553(a), I am to consider your
14 history and characteristics. And from your counsel's very
15 thoughtful sentencing submissions and the letters attached to
16 it, as well as, of course, from the presentence report, I saw a
17 different side of you. I noted you have a long history of
18 gainful employment, as reflected in paragraph 73 through 78 of
19 the presentence report, which reported the number of jobs
20 you've held several years at a time.

21 I noted as well the letters from your family, who
22 attested you are a devoted son, grandson, brother, and father.
23 I won't read excerpts from those aloud. Please know that I
24 read them all with care and was moved by them. You come across
25 as a person who has given deeply to his community, who means a

1 great deal and to whom his family is deeply devoted and whose
2 absence has left a great void and caused much anguish. I was
3 particularly struck by the faith that your family has that you
4 will put this phase of your life behind you. Your family and
5 your friends regard you as a good person who has made an
6 uncharacteristic mistake. I was struck as well, as Mr. Del
7 Valle chronicled, how much your children are suffering in your
8 absence.

9 Finally, I'm mindful, as Mr. Del Valle rightly pointed
10 out, that you were taken into custody in late December and that
11 since March you have experienced harsh prison conditions on
12 account of the current pandemic. The need to curb the spread
13 of COVID-19 has resulted in extreme lockdowns within the MCC,
14 on restrictions on family visits and contact and on
15 restrictions on visits and contact with attorneys.

16 As I've said in a number of other cases, and as
17 various colleagues of mine have also recognized, a day spent in
18 terribly substandard prison conditions, although not intended
19 as a form of punishment, exacts more punishment for an
20 incarcerated defendant than a day in ordinary conditions. When
21 a defendant has already, before sentencing, suffered from
22 unusually arduous conditions, it's appropriate to consider that
23 experience in determining the appropriate sentence. I'll do so
24 today.

25 The fact that for the past eight months or so in

1 custody has been in trying conditions is an argument for a
2 below-guidelines sentence, and the sentence I impose today will
3 be farther below the guidelines sentence than it otherwise
4 would have been on account of the conditions in which you've
5 been held.

6 In the end, my judgment is that a sentence, while
7 substantial, is also below the guidelines. Such a sentence is
8 warranted here. The fact that this was your first offense is
9 the principal reason, so too is the extra harsh nature of
10 federal custody today, and your personal characteristics that I
11 chronicled a moment ago matter too. After giving the matter a
12 thought, I ultimately conclude that the sentence recommended by
13 the probation department, 36 months' imprisonment, is on the
14 mark. Such a sentence under the particular circumstances here
15 is, in my view, sufficient to reflect the gravity of the
16 offense and to reflect just punishment.

17 I have considered whether a lower sentence than that
18 can be justified as reasonable and consistent with the 3553(a)
19 factors. With regret and with particular attention to the
20 gravity of the crime, I don't believe that it can.

21 I am now going to formally state the sentence I intend
22 to impose. The lawyers will have a further opportunity to make
23 legal objections before it is imposed.

24 Mr. Marmolejos, were we in court right now, I would
25 ask you to rise. I don't want you to do that. Just pay extra

1 close attention to what I'm about to say.

2 After assessing the particular facts of this case and
3 the factors under section 3553(a), including the sentencing
4 guidelines, it's the judgment of the Court that you are to
5 serve a sentence of 36 months' imprisonment to the custody of
6 the Bureau of Prisons to be followed by a period of three years
7 of supervised release.

8 As to supervised release, the standard conditions of
9 supervised release shall apply. In addition, you shall be
10 subject to the following mandatory conditions: You shall not
11 commit another federal, state, or local crime. You shall not
12 illegally possess a controlled substance. You shall not
13 possess a firearm or destructive device. You must cooperate in
14 the collection of DNA as directed by the probation officer.

15 I'm also going to impose the special conditions that
16 are set out on page 24 of the presentence report. For the
17 record, I incorporate by reference verbatim the special
18 conditions there.

19 Very briefly, just by way of overview, you are
20 required to obey the immigration laws and comply with the
21 directives of the immigration authorities. You must
22 participate in an outpatient treatment program approved by the
23 U.S. Probation Department with respect to drug and alcohol
24 abuse.

25 And you shall submit your person and any property,

1 residence, vehicle, papers, computer, etc. to a search by the
2 probation department to be conducted when there is reasonable
3 suspicion concerning a violation of a condition of supervision.

4 I am doing that because the nature of this offense
5 says to me that it is possible that when you are on supervised
6 release, you will be tempted again to make the very terrible
7 mistake you did here and commit another crime like drug
8 dealing. I hope that's not the case, but experience in many
9 other cases has told me that even with first offenders that
10 people do sometimes revert, while on supervised release, to
11 committing a crime.

12 I think it's useful for you to know that the probation
13 department will have maximum eyes on you and your things, your
14 computer and your home, your car and stuff. If that helps stay
15 your hand, if it helps deter you from committing another crime,
16 it will ultimately observe the 3553 interest in your
17 rehabilitation and your successful return to lawful society and
18 it will protect the public by deterring you from committing
19 future crimes. So for those reasons I want to include the
20 condition that empowers the probation department under the
21 circumstances recited to conduct such a search. I'm required
22 to impose a special assessment of \$100, and I do so.

23 Mr. Schrier, is the government seeking forfeiture? I
24 take it restitution is not an issue in a crime like this.

25 MR. SCHRIER: Your Honor, in this case no forfeiture

1 or restitution. Forfeiture because of the unique circumstances
2 of the case regarding the consignment aspect of the arrangement
3 between the defendant and the CS.

4 THE COURT: Thank you, Mr. Schrier.

5 I have the legal authority to impose a fine. I am not
6 going to order you to pay one. I am persuaded you don't have
7 the ability to pay it, to the extent you might have a very
8 slight ability to pay, and I would rather that money be used
9 for your family.

10 Does either counsel, beginning with the government,
11 know of any legal reason why this sentence shall not be imposed
12 as stated?

13 MR. SCHRIER: No, your Honor.

14 THE COURT: Defense.

15 MR. DEL VALLE: No, your Honor.

16 THE COURT: The sentence as stated is imposed.

17 Mr. Schrier, are there any open counts or underlying
18 indictment?

19 MR. SCHRIER: There are none, your Honor.

20 THE COURT: Mr. Marmolejos, to the extent you haven't
21 given up your right to appeal your conviction and your sentence
22 through your plea of guilty and the plea agreement you entered
23 into with the government, you have the right to appeal those
24 things, your conviction and your sentence. If you are unable
25 to pay for the cost of an appeal, you may apply for leave to

1 appeal *in forma pauperis*. The notice of appeal must be filed
2 within 14 days of the judgment of conviction.

3 Mr. Del Valle, any recommendation you'd like me to
4 give to the Bureau of Prisons?

5 MR. DEL VALLE: Yes, your Honor. First, I would ask
6 if the Court would consider an RDAP program for Mr. Marmolejos.

7 THE COURT: I'm happy to recommend that he be admitted
8 to any drug treatment or alcohol treatment program in prison
9 for which he is eligible. I'm glad to do that.

10 MR. DEL VALLE: Thank you, your Honor.

11 Second, we would ask, to the extent that the Court can
12 recommend, that Mr. Marmolejos be housed in a facility close to
13 New York City, that being Fort Dix, if that's available, in New
14 Jersey. I know and I explained to Mr. Marmolejos that the
15 Court cannot order this, but a recommendation sometimes is
16 highly regarded by the Bureau of Prisons.

17 THE COURT: What I will do then is to recommend that
18 he be assigned to Fort Dix and, failing that, a location as
19 close as possible to New York City to accommodate family
20 visits. Is that what you had in mind?

21 MR. DEL VALLE: Yes, your Honor. Thank you.

22 THE COURT: I'm happy to do that.

23 Anything further from the defense?

24 MR. DEL VALLE: Nothing further from the defendant.

25 THE COURT: Anything further from the government?

1 MR. SCHRIER: No, your Honor.

2 THE COURT: Mr. Marmolejos, before we adjourn I want
3 to wish you the very best. This was your first offense and
4 there is good reason to hope and expect that it will be your
5 last.

6 I hope you take a lot of pride and comfort and solace
7 from the wonderful things that the people who know you best
8 said in those beautiful letters to me. Those really register
9 with me. The fact that the people who know you best and
10 believe in you like that, that should give you great pride and,
11 hopefully, should be an impetus to lead you to conform your
12 conduct to the law going forward so that the same pride that
13 they have in you is borne out. I have a great deal of
14 confidence this will be the last time that I or another judge
15 has occasion to see you. Again, I wish you the very best.

16 Thank you. We stand adjourned. I wish all counsel
17 and everyone on the phone, court reporter, interpreter,
18 Mr. Marmolejos, a happy and healthy Thanksgiving.

19 Thank you. We stand adjourned.

20 (Adjourned)

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